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FILED
OCT 29 1957
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IN THE

Supreme Court of the United States

OCTOBER TERM, ———

No. 584

QUINN K. SMITH,

Petitioner

vs.

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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TO THE UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT**

*TO THE HONORABLE THE SUPREME COURT
OF THE UNITED STATES:*

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 245 F(2) 464 (Advance Sheet of August 26, 1957); the written, but unreported opinion of the Western District of Louisiana appears at Page 81, et seq., Record; both opinions printed in Appendix.

JURISDICTION FOR WRIT

Both opinions below ignore two well established lines of decisions of the State Supreme Court in BURDEN OF PROOF placed on defendants when an accident or impact occurs to his left of the center of a street or highway, and choose rules of negligence applied by intermediate or appellate state court decisions in preference to those established by the Louisiana Supreme Court in a case which is parallel on the facts with the case at bar, pertaining to intersectional collision, hence under Rule 19, 1 (b), of this Court, the lower federal courts have decided important state questions in direct conflict with state law, as established by its Supreme Court.

The United States Court of Appeals decision sought to be reviewed was rendered June 21, 1957, application for Rehearing denied and entry made August 3, 1957.

QUESTIONS PRESENTED FOR REVIEW

1. The facts of the present case are on all-fours and parallel with the facts from which the Louisiana Supreme Court clarified its stand on the pre-emption doctrine in this state, choosing views expressed by the First Circuit Court of Appeals, in preference to those expressed by the Orleans Court of Appeals, by reversing the Orleans Circuit in the case of *Booth v. Columbia Casualty Company*, 74 So (2) 776, Reversed, 227 La. 932, 80 So (2) 869. Both tribunals below have relegated the Booth case to one of restrictive application not warranted

by the language employed by the Supreme Court therein or the many cases cited as exemplary of the principles therein expressed;

2. The decisions complained of cite as authority intermediate or appellate decisions of the State Courts in which no applications for Writs of Review were made by the party cast therein, hence since they are in conflict with the Supreme Court doctrine, are not to be followed by the federal tribunals in preference:

3. Louisiana law establishing the Burden of Proof on the party to an accident which occurs to his left of the center of a street or highway, without adequate explanation, and that fact has only a casual relation to the cause of the accident is liable, was totally ignored in this case;

4. The trial court attempted to stop the trial before plaintiff had completed its case (Pages 64, 65, Record); a verbal opinion was dictated to the reporter 30 minutes after conclusion of the case, when counsel was called on to submit authorities hurriedly, on January 25, 1957. The reporter's transcript was made March 6, 1957 (R. 85). No argument was heard by the Court on application for rehearing since it felt bound by *Segrito v. American Automobile Insurance Co.*, 137 F Supp 194, notice of affirmation received by it on that date (239 F(2) 641). It was not until the evidence had been transcribed, long after the trial court lost jurisdiction, that the negligent driving across the center of the street by

defendant driver, could be mathematically determined and appraised, hence the district court did not even consider that point in its hurried application of the pre-emption doctrine (See Opinion).

STATEMENT NECESSARY FOR A DECISION

Plaintiff was proceeding west on Walnut Street in Shreveport, Louisiana, on October 29, 1954, which intersects Pierre Avenue at right angles. In obedience to a Stop Sign, he came to a complete stop, waited until north bound traffic cleared on Pierre and glanced to his right and then in low gear started slowly across—maximum speed 8-10 miles per hour—when the right side of his car was struck by the left front the truck-tractor unit operated by McGill, driver for Holicer Gas Company, headed south on Pierre (R. 60-64). McGill was 15 to 20 feet from the intersection when he first saw the Plymouth emerge out from behind a parked panel truck on Pierre (R 33 L 24; R 34 L 21). He traveled STRAIGHT AHEAD (R 37 L 11, 12; R 43 Ls 12-17; R 43 Ls 21-23); His speed was 20 miles per hour (R 29 L 18; 39 L 24). A high terrace on the northeast corner, plus the parked truck on Pierre, made it impossible for either driver to see the other until Smith's car came out into Pierre from behind the parked truck. The standard width of a truck is 8 feet, according to McGill (R 30 Ls 4-10).

By actual measurements at the scene by the police, Record 56 Ls 11-16:

"Point of impact was 13' 5" west of east curb of Pierre,****** The Ford skidded overall 11 feet, Plymouth was pushed sideways south on Pierre approximately 10 feet***."

Finding of fact by the Court: R 82 Ls 2-4

"* * * point of impact, which occurred slightly to the east of the midline of Pierre Avenue at a point 13 feet 5 inches west of the east curb line of Pierre Avenue; * *"

Police Testimony, Record 50, Lines 10-11:

"The width of Pierre Avenue is 33 feet ten inches."

The undisputed facts show: That after stopping and looking, Smith started across Pierre in low gear and had entered the intersection well in advance of the truck, or was over 8 feet into the east half of Pierre when he was struck at least 3½ feet to the east of the center of this two-lane street; that McGill testified that he approached and entered the intersection at 20 miles per hour, travelling 3½ feet to the left of the center as he neither turned left or right up to the point of impact.

This record is bare of any explanation attempted for McGill's driving to the left of the center of the street upon which he had been traveling and up until the point of impact. The actual measurements control over the estimates used by the witnesses.

Jurisdictional grounds for filing this case in a federal court is conferred by 28 USCA 1332, Diversity of Citizenship, plaintiff, a resident and citizen of the

Western District of Louisiana and defendant a corporate citizen of Pennsylvania, for damages flowing from an accident which occurred in Louisiana; amount in controversy in excess of $3,000.00; Louisiana's direct action statute permitting suit in federal courts against the insurer. LSA-R. S. 22:655 and 22:985. Defendant had a liability policy on the truck-tractor involved in this accident with plaintiff with limits of $10,000.00 (R 13).

ARGUMENT AMPLIFYING REASONS FOR WRIT

The decisions complained of are clearly erroneous.

The Orleans Circuit Court of Appeals in its opinion at 74 So (2) 776, *Booth v. Columbia Casualty Company*, quoted from the testimony showing that Booth came to a complete stop before attempting to cross a right-angled intersection in the City of New Orleans, which had the right of way over his vehicular direction. He could not see to his right very far due to a building obstructing his view. He slowly, in low gear, started across the right of way street when he was struck on the right side by the front of a truck approaching from his right. Booth's speed was 7 miles per hour; that of the truck was 20 miles per hour, on a two way street; that he had traveled 4 or 5 feet into this 18 foot wide street before he could detect the approach of the truck to his right. The court ruled that plaintiff's own testimony convicted him of contributory negligence and denied recovery. The Supreme Court of Louisiana reversed by a unanimous decision in these words:

"It appears from the evidence in this case that the plaintiff first entered the intersection of the streets traveling at the rate of about seven miles per hour and was fully within the intersection when his car (Booth) was struck by the garbage truck. The testimony of the defendant's driver and his companion in the truck discloses that the plaintiff's car was in the middle of the intersection when it was struck by the garbage truck and that the garbage truck was traveling at a rate of approximately twenty miles per hour. All the parties to this suit concede that this is a blind intersection. The testimony shows that the plaintiff slowed down before entering the intersection and entered the street at a rate of speed of seven miles per hour. THE PLAINTIFF HAVING PRE-EMPTED THE INTERSECTION HAD THE RIGHT TO PROCEED AND UNDER THE WELL-SETTLED JURISPRUDENCE THE AUTOMOBILE WHICH FIRST ENTERS THE INTERSECTION HAS THE RIGHT OF WAY OVER AN APPROACHING AUTOMOBILE AND THE DRIVER WHO DOES NOT RESPECT THIS LEGAL RIGHT OF THE AUTOMOBILE WHICH FIRST ENTERED THE INTERSECTION TO PROCEED THROUGH IN SAFETY, IS NEGLIGENT, EVEN THOUGH THE CAR THEREAFTER ENTERING THE INTERSECTION IS BEING DRIVEN ON A RIGHT OF WAY STREET. GAUTHIER v. FOGLEMAN, LA. APP., 50 SO 2ND 321 AND THE AUTHORITIES CITED THEREIN. WE DO NOT FIND ANY EVIDENCE TO SHOW ANY CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF." (Emphasis added).

We would never have pursued the present case to trial had the lower court's opinion remained the law. That the Booth decision was not intended to be restrictive is amply demonstrated by the language employed therein and the citation of the *Gauthier v. Fogleman case*, 50 So (2) 321, rendered by the First Circuit, AND THE AUTHORITIES THEREIN CITED, as exemplary of the principles declared.(1)

An objective comparison of the present facts brings Smith's right to recovery into focus: He came to a complete stop on Walnut Street in obedience to a Stop Sign; he observed traffic to his left on Pierre and when that was clear, glanced to his right and could see no traffic approaching from that direction. In low gear, he started across Pierre, had to emerge from behind a parked panel-type truck located just north of the intersection on Pierre, in addition to a high embankment at the northeast corner. Since the standard width of a truck was testified by defendant's driver to be 8 feet, Smith necessarily had to travel into the east half of Pierre before he could physically see the south-bound equipment driven by McGill. His maximum speed was 8-10 miles per hour. He legally had the whole east half of Pierre to maneuver in as his own, was where he had a right to be when struck on the right side by the front of the truck-tractor, at least three

(1) *Hutto v. Arbour*, 4 So. (2) 84, Cert. Den.; *Phares v. Courtney*, 27 So (2) 925; *Gardiner v. Travelers Ind. Co.*, 11 So (2) 61; *Grouchy v. Globe Furniture Co.*, 16 La. App 311, 134 So. 347; *Drake v. Crowley Yellow Cab Co.*, 41 So (2) 533.

and one-half (3½) feet east of the center line of Pierre. It is admitted that Smith first entered this intersection and we explain in detail the circumstances to negative the biased picture attempted in the opinion below. All witnesses estimated McGill's speed at 20 miles per hour.

Under these circumstances the Supreme Court has unequivocally held that Smith then had the right to proceed over McGill and McGill's failure to respect this right of way rendered him negligent, which negligence was the proximate cause of the accident, and entitled to recover; that as was Booth, Smith was not guilty of any negligence barring recovery. Implicit in the Booth decision of pre-emption is the holding that Booth's and Smith's actions did not constitute contributory negligence.

The investigating police officers measured the POINT of IMPACT at the scene and their findings are adopted by the trial judge. Pierre Avenue was 33 feet 10 inches wide. Mathematics then definitely proves McGill's gross negligence in driving 3½ feet to his left of the center of Pierre, into a blind intersection and striking Plaintiff at a point where he had a right to be.

As further proof that the present Louisiana Supreme Court intends to cling to its previous views expressed in the Booth case, and its continuing difference with the Orleans Circuit, is demonstrated by the subsequent reversal of that court in *Thomas v. Checker Cab Company of New Orleans*, 229 La. 1079, 87 So(2) 605, decided

unanimously March 26, 1956, Rehearing Denied May 7, 1956, reversing 76 So(2) 757, the Supreme Court said:(2)

> "Having preempted the intersection after stopping, looking, and ascertaining that there was no apparent danger, he had the right of way over a vehicle (the taxicab) approaching from his right, even though this vehicle was being operated on a right of way street. Booth v. Columbia Casualty Company, 227 La. 932, 80 So 2nd 869, and authorities therein relied upon."

Error 2

The authorities cited as against the views of the Supreme Court are: *Toups v. Trent*, 85 So(2d) 96; *Ehtor v. Parish*, 86 So(2) 543; *Mansfield v. Toye Brothers Yellow Cab Co.*, 78 So(2) 544; *Anderson v. Morgan City Canning Company*, 73 So(2) 196, all Orleans Circuit cases, which the Supreme Court has consistently reversed on the premption doctrine. In all of these alleged authorities followed by the federal courts here, there were no applications for Review to the Supreme Court, hence they do not represent the law of Louisiana, are not to be followed in preference, as this Court has repeatedly said (See Certificate in Appendix by Clerk of Supreme Court).

The *Segrito v. American Automobile Insurance Company case, supra*, attempted to distinguish the facts there from the Booth case doctrine, in footnote as follows:

---

(2) The Fifth Circuit has acknowledged that the preemption law of Louisiana is embodied in these two leading cases in *Denton v. Indemnity Ins. Co. of North America*, 240 F(2) 604.

> "The cited cases, however, are distinguishable on their facts from the case at bar. Only one of them involves a stop sign, *all of them involve two-way streets*, and all, but one, involve high speeds on the part of defendant." (Emphasis added).

Since the sole reason for distinguishing the Booth case was a two-way street, we do not even have that distinction in this case; additionally, the alleged authorities are also inferior court decisions not passed on by the Supreme Court and certainly do not alter the later doctrine of that court.

Errors 3 and 4

The trial court utterly failed to consider the question of BURDEN OF PROOF, placed by Louisiana law on driver McGill, to explain his failure to keep to his right as he approached and maneuvered into this intersection 3½ feet to the left of the center line of Pierre, because of the hurried treatment explained in rendering a verbal opinion 30 minutes after completion of the trial before the testimony had been transcribed. Driver McGill's testimony convicts him of gross negligence when he insists that he neither swerved to his left or right but kept a straight course ahead until the impact (Record, P. 43 Lines 12, et seq), confirmed in answer to a leading question put by the judge (P 43 L 21, et seq).

Louisiana law is clear that when an accident or impact occurs to the left of the center of a street or highway, the operator of that vehicle must logically explain his failure to keep completely to his right, a universal rule

of the road, except in England; that failure to make said explanation, and the failure to keep to the right has only a CASUAL CONNECTION with the occurrence of the accident, renders him liable. *Schick v. Jenevein*, 145 La. 333, 82 So 360; *Potter v. Glassell*, 146 La. 687, 83 So 898; *Watson v. Hightower*, 181 So 612; *Lacy v. Lucky*, 140 So 857; *Smith v. Baker*, 59 So(2) 714; *Finance Security Corp. v. Alford*, 63 So(2) 872; *Wilhite v. Gilmore*, 91 So(2) 461. See quotations and argument on this point developed in application for rehearing filed in Fifth Circuit (Pages 99-106, Record).

It should be amply demonstrated that Smith did all a reasonable man could be expected to do, under the circumstances materially contributed to by McGill's obvious negligence. Under this state of facts, it was McGill's duty to come forward and explain or justify his negligence or he would be liable under Louisiana law for damages.

McGill's actionable negligence prevented Smith from having more time and opportunity to avoid a collision since he was deprived of his east half of the street in which to maneuver safely, the obstructions preventing him from having that opportunity until he practically reached the center of Pierre, a two-lane street; that if any element required by the Supreme Court under the pre-emption doctrine was missing, it was directly due to the negligence of McGill, which negligence places him on the horns of the alternative dilemma, BURDEN OF PROOF.

Federal Law

Since the land-mark case of *Erie Railroad Co. v. Tompkins*, 304 US 64, 82 Led 1188, 58 S Ct 817, 114 ALR 1487, state court decisions on local matters, are Rules of Decisions in Federal Courts, brought under Diversity of Citizenship jurisdiction. See Annotation 83 L ed 519. BURDEN OF PROOF in a negligent injury case is controlled by state law. *Cities Service Oil Co. v. Dunlap*, 308 US 208, 84 L ed 196, 60 S Ct 201; Contributory negligence and tort law generally is likewise controlled. *Palmer v. Hoffman*, 318 US *109, 87 L ed* 645, 63 S Ct 477, 144 ALR 719. It is the duty of the federal courts to determine what the state law is, not what is ought to be. The doctrine merely concedes as much independence to the courts of the states as it reserves for the courts of the Union, in their respective spheres. *Bernhart v. Polygraphic Co.*, 350 US 198, 76 S Ct 293, 100 L ed 199; *West v. Am. Teleph. & Teleg. Co.*, 311 US 223, 61 S Ct 175, 85 L ed 139, 132 ALR 956; *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 US 487, 61 S Ct 1020, 85 L ed 1477; *Meredith v. Winter Haven*, 320 US 228, 64 S Ct 7, 88 L ed 9; *Guaranty Trust Co. v. York*, 326 US 99, 89 L ed 2079, 65 S Ct 1464, 160 ALR 1231.

CONCLUSION

WHEREFORE, petitioner prays that the application for certiorari be granted; that eventually the opinions below be reversed and judgment rendered in

favor of plaintiff for $10,000.00, plus interest and costs; further prays for all decrees necessary, general and equitable relief in the premises.

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APPENDIX A.

QUINN K SMITH vs INDEMNITY INSURANCE COMPANY OF N. A.

THE COURT:

The court has read the citations furnished by counsel for plaintiff and counsel for defendant and is now ready to render its oral decision. The Court finds the facts in this case to be as follows:

1. Plaintiff is a resident citizen of Louisiana, and Defendant is a corporate citizen of Pennsylvania.

2. Pierre Avenue in the City of Shreveport, Louisiana, is approximately 33 feet wide, and intersects at right angles Walnut Street, which is approximately 24 feet wide. Pierre Avenue runs north and south. Walnut Street runs east and west

3, The accident upon which Plaintiff brings this suit occurred at approximately 8 A. M. on October 29, 1954. At that time and place, Plaintiff was driving his 1950 Plymouth sedan in a westerly direction on Walnut Street and the tractor-trailer combination insured by Defendant was proceeding in a southerly direction.

4. The physical facts were such that entry into Pierre Avenue by Plaintiff from Walnut Street was more or less blind due to an embankment on the northeast corner, plus a parked van type truck which was situated close to the northeast corner headed north on Pierre Avenue.

5. Plaintiff drove his car to the intersection and brought it to a stop before attempting to enter the intersection. He looked to his left before driving forward,

and after having waited for northbound traffic to clear the intersection, proceeded forward without stopping, or attempting to stop, until he reached the point of impact, which occurred slightly to the east of the midlane of Pierre Avenue at a point 13 feet 5 inches west of the east curb line of Pierre Avenue; 16 feet 10 inches southwest from the northeast corner, and 24 feet 7 inches northwest from the southeast corner of the intersection.

6. Plaintiff did not and could not see the approching truck-trailer combination until he had passed the rear of the parked van truck. When he did see the truck insured by the Defendant, instead of attempting to stop, he "took a chance" and tried to beat the truck across the intersection. He was proceeding at a rate of speed of approximately 10 miles an hour.

7. The driver of the truck insured by Defendant, Mr. Floyd M. McGill, was maintaining a careful lookout and proper control of the truck, and was proceeding at a rate of speed of approximately 20 miles per hour when he observed Plaintiff proceeding into the intersection in front of him. He could not see Plaintiff's car until it was approximately 8 feet from the point of impact. At that time he was approximately 15 feet north of the north line of Walnut Street. He immeditely applied his brakes but was unable to bring the truck and trailer to a stop before striking Plaintiff's car, the impact occurring less than one second after Plaintiff's car came into McGill's view and being between the left front portion of the truck and the right side and rear portion of the Plymouth. Thus confronted with an emergency, Mr. McGill could not have avoided the accident no matter what he did.

8. Plaintiff received various personal injuries in the accident unnecessary to detail here because of the conclusions of law which the Court has reached and now will set forth.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the cause of action on the grounds of diversity of citizenship, pursuant to 28 USCA, Sec. 1332.

2. Plaintiff was guilty of negligence which was the sole proximate cause of the accident.

3. Defendant's insured truck driver was guilty of no negligence under the circumstances.

4. The case of Booth vs. Columbia Casualty Company, 227 La. 932; 80 So. 2nd 869, relied on by Plaintiff, stands for a decision only upon the peculiar facts there involved, and that case is not controlling here. As pointed out by the Louisiana Court of Appeals for the Parish of Orleans, in speaking of the Booth case, "Decisions of the Supreme Court are to be accorded only a reasonable construction, and with this in mind, we feel sure that the Supreme Court never intended that its holding in Booth vs. Columbia Casualty Company, supra, would be applicable in a case such as the one before us where the motorist claiming pre-emptive rights entered a narrow intersecting street without looking, and fully cognizant of the fact that to attempt a crossing would be equivalent to gambling with life and limb. * * *" Continuing, "We think that the jurisprudence applicable to the case is to be found in the many decisions of the Court of Appeals to the effect that the motorist, before he can successfully rely on pre-emption, must show he made entry into the intersection at proper speed and sufficiently in advance of the car on the intersecting road to permit him to go on his way without requiring an emergency stop by the other vehicle. The entry into the intersection just a fraction of a second ahead of the other vehicle does not create a pre-emption." To the same effect, there is the case of

Toups vs. Trent decided by the Orleans Court of Appeals at 85 So. 2nd. pg 96; Segreto vs. American Automobile Insurance Company, decided by Judge J. Skelly Wright of the United States District Court for the Eastern District of Louisiana, reported at 137 Fed. Supp. 194 affirmed on January 17, 1957, ... Fed ..... As pointed out by Judge Wright in that decision, in which he mentions the Booth case and others somewhat similar to it, "The cited cases, however, are distinguishable on their facts from the case at bar. . . . Moreover, the authorities cited by the Plaintiff accept the principles of law herein referred to."

In the course of his opinion, Judge Wright made the following statement which we accept and adopt as correct: "The courts of Louisiana have held time and again that 'a motorist who merely stops before attempting to enter a right-of-way thoroughfare has only performed one-half of the duty resting upon him. To stop and then proceed forward without ascertaining if it is safe to do so is negligence of a gross character and renders the person guilty of such imprudence responsible in damages resulting therefrom'." Citing Anderson v. Morgan City Canning Company, 73 So 2nd 196. Continuing, "Louisiana Courts have further held: 'To say that one who blindly enters an intersection directly into the path of an approaching vehicle which is in close proximity has acquired the right-of-way by pre-emption merely because he negotiates the greater part of the intersection, would be absurd.'" Citing Mansfield vs. Toye Brothers Yellow Cab Company, 78 So. 2nd 544.

Upon the basis of these authorities, and the decisions cited in them, the Court has no alternative but to reject the plaintiff's demands at his cost.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16612

QUINN K. SMITH,

Appellant,

versus

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

(June 21, 1957.)

Before HUTCHESON, Chief Judge, and TUTTLE and CAMERON, Circuit Judges.

HUTCHESON, Chief Judge: This is an appeal from a judgment in a negligence suit tried to the court without a jury, in which the district judge found that defendant was guilty of no negligence and the plaintiff was guilty of negligence, which was the sole proximate cause of the accident.

Here, as he did below, plaintiff insists that under *Booth v. Columbia Casualty Co.*, 227 La. 932, 80 So.(2) 869, a judgment in his favor was demanded.

The district judge in an unreported opinion carefully discussing, evaluating and applying the relevant decisions to the evidence in the case, held that the plaintiff's contention was unsupported in law and in fact.

Impressed as we are with the sincerity and earnestness of appellant's insistence that the district judge has declined and refused to follow the law of Louisiana as declared by its courts, we are bound to say, after reading the Louisiana cases, that we cannot agree with him. Indeed, we think it plain that the Booth case cannot be read as deciding anything more than that, under the applicable law applied to its facts, plaintiff was not guilty of contributory negligence. To hold, as appellant thinks we should, that the decision precludes a trier of facts in the federal court from determining the existence vel non of negligence in similar intersection cases would. we think, run counter[1] to the governing law in the federal courts which makes the determination of fact questions the business not of appellate but of trial courts. Moreover, as is made plain in the Louisiana cases[2] relied on by the district judge and the appellee, it would also run counter to Louisiana law, which, though it accords to the appellate courts of the state the right to determine fact questions for themselves, does not, any more than federal law does,

1 Employers Liability v. Madden, 219 F(2) 205; Wright vs. Paramount-Richards, 198 F(2) 303; Horton v. United Service, 218 F(2) 453; Burcham v Stevens & Co., 209 F(2) 35.

2 Ehtor v. Parish, 96 S(2) 548; Toups v. Trent, 85 S(2) 96; Cf. Segreto v. American Automobile Ins. Co., 137 F. Supp. 194, affirmed 239 F(2) 641

convert a fact determination in a particular case into a rule of decision binding the triers of facts in subsequent cases to decide them in the same way.

This being a fact case, and the findings and conclusions of the trial court not being clearly erroneous, the judgment is AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

New Orleans, Louisiana

APPENDIX C

ORDER DENYING REHEARING

Extract from the Minutes of August 3, 1957

No. 16612

QUINN K. SMITH,

versus

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX D

UNITED STATES OF AMERICA

STATE OF LOUISIANA

SUPREME COURT OF THE STATE OF LOUISIANA

I, V. J. Courville, Clerk, Supreme Court of Louisiana, do hereby certify that no applications for writs of review from the decisions of the Courts of Appeal have been filed in this the Supreme Court of Louisiana in the following cases:

1. Toups v. Trent, 85 So. 2d. 96;
2. Ehtor v. Parish, 86 So. 2d. 543;
3. Anderson v. Morgan City Canning Co., 73 So. 2d. 196;
4. Mansfield v. Toye Brothers Yellow Cab Co., 78 So. 2d. 544.

In witness whereof, I hereunto sign my name and affix the seal of the court aforesaid, at the City of New Orleans, this the 16th day of October, A. D., 1957.

(s) V. J. COURVILLE
Clerk, Supreme Court of Louisiana

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No. 584

QUINN K. SMITH,

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Respondent

REPLY BRIEF OF PETITIONER TO OPPOSITION BY RESPONDENT

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REPLY BRIEF OF PETITIONER TO OPPOSITION BY RESPONDENT

MAY IT PLEASE THE COURT:

Respondent has deemed it necessary to file a brief in opposition to the granting of a writ in this case, urging that the Court is too busy to consider common, garden variety facts involving no law whatever; that this Court will not consider "inferences" to be drawn from the facts.

It is from garden variety facts that great principles evolve; it was from garden variety facts that the Supreme Court of Louisiana announced its far reaching definition

of the preemption rule applicable to intersectional collisions in this state, which is in direct opposition to the rule imposed by the lower federal courts in this case, denying plaintiff recovery.

There are two important issues involved here:

1.

Shall the federal courts sitting in Louisiana in diversity cases apply different rules of negligence than those established by its highest court, the application or choice determining recovery vel non.

Reduced to its simplest form, we have this circumstance: The Orleans Court of Appeals held in *Booth v. Columbia Casualty Co.*, 74 So 2nd 776, at page 777:

> "It is rudimentary that the plaintiff, as he approached the blind intersection, was charged with the responsibility of looking for traffic approaching the intersection on St. Louis Street before he himself entered the intersection. Moreover, this obligation required plaintiff to maintain his car under such control as to enable him to stop his car on entering the intersection if he could not safely complete the crossing."

The Louisiana Supreme Court, by unanimous decision, reversed the Orleans Circuit, granting Booth recovery, the facts showing that he properly stopped before attempting a crosssing of St. Louis Street but due to a blind intersection, he had to travel out into the streets before he could see the truck approaching from his right and on a right of way street. Since he first entered the

intersection, the highest tribunal of this state held that Booth acquired the right to proceed — had the right of way over defendant and granted recovery.

We have exactly the same principle and facts in the instant Smith case, wherein the trial court denied recovery, applying the very rules as conditions precedent to recovery set up by the Orleans Court of Appeals; furthermore, all the decisions relied on by the lower federal courts here, are the same requirements of the Orleans Circuit in which no Review was requested by the parties cast therein, and which views the Supreme Court has specifically rejected.

It is now indeed ironic if the federal appellate courts sitting in Louisiana, applying negligence rules in diversity cases, may adopt the Orleans Circuit cases as authority, and ignore the law applied by the Supreme Court.

This issue, far from being without any law, is of national, as well as state wide importance. For if the Supreme Court of the United States is too busy to correct this trend, the doctrine established in *Erie v. Tompkins*, and followed intact in a long line of decisions thereafter, will be meaningless in the vast field of tort law, one rule applying in the state courts and a different rule applied by the federal tribunals sitting side by side. And which view—that of the Supreme Court or that of the Orleans Circuit—is the better view, is totally immaterial on this issue.

2.

Even if we concede—which we do not—that there was some minor element missing in the instant Smith case, required by the Louisiana Supreme Court under the Booth decision and doctrine, respondent's driver, McGill, is chargeable therewith in approaching, entering and causing the impact with the right side of Smith's vehicle, 3½ feet across the center of Pierre Avenue, to his left of the center, which fact places the burden of proof on him, of exculpating himself from that negligence. He is foreclosed by his own testimony, of the charge of gross negligence, for he said he swerved neither to the right or the left but kept a straight course ahead, up until the impact. Far from "inferences", we have mathematical certainty establishing this fact, plus McGill's sworn testimony.

This very valuable "tool" of a damage suit lawyer is totally ignored in the decisions complained of, the clearly erroneous conclusions emanating from the hurried treatment of the case by the trial judge in his haste to apply (or misapply) the pre-emption doctrine of the intermediate appellate courts of Louisiana to the facts.

The presumption of negligence is on the party on the wrong side of the road. *Potter v. Glassell*, 146 La. 687, 83 So. 687. This presumption of negligence is applied in right-angled intersectional collisions. *Cooke v. Seegers*, 17 La. App. 313, 136 So. 216; *Golomsky v. Kihneman*, 16 La. App. 304, 134 So. 266; *Wilhite v. Gilmore*, 91 So. 2nd 461. See quotations from the decisions (99-106 Record). Only a casual relation to the cause of the impact is required by Louisiana appellate and Supreme

Court decisions, to place the burden of proof on the driver to the left of the center of a street or highway. Granting defendant three and one-half feet—nearly half the width of the truck—is too much footage to exempt from the operation of this rule of negligence, for it is clear that plaintiff was deprived of just that much time and opportunity to avoid the collision at this blind intersection. At his slow speed, he could have stopped before reaching the path of the truck in the west (rather than in the east) traffic lane, although he (Smith) had the right of way over McGill. Certainly the casual connection of McGill's negligence is self evident.

CONCLUSION

The rules of negligence enforced by the federal tribunals below are clearly erroneous, affecting as they do the important field of damage suits filed under diversity of citizenship jurisdiction, certiorari should be granted herein.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 584

QUINN K. SMITH,

Petitioner

vs.

INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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LECOMTE, SHREVEPORT, LOUISIANA

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MAY IT PLEASE THE COURT:

We find it extremely difficult to determine upon what grounds petitioner here believes this case warrants granting of certiorari by the Supreme Court of the United States.

Rule 19 of the Rules of the Supreme Court of the United States, in general, points out the character of cases which this Court considers warrants the issuance

of certiorari. By no stretch of the imagination does this case come anywhere near presenting any question of law at all, much less a question of law of public importance.

This suit is a common, garden variety damage suit. It was tried in the District Court before the Judge sitting without a jury. The District Judge found as a fact that the defendant's driver was not negligent and that the accident forming the basis of the suit was caused by the sole negligence of plaintiff. Not a single question of law was involved. Admittedly the case came within Article 2315 of the Civil Code of Louisiana,(1) the basic law of the State permitting recovery in damage cases. The case was in the District Court by virtue of diversity of citizenship.

On appeal to the United States Court of Appeals for the Fifth Circuit, that Court, at 245 Fed. 2d 464, affirmed the judgment of the District Court. The Court of Appeals found the judgment of the District Court not only not manifestly erroneous, but found it correct and approved the findings of fact and of law of the District Judge.

The tenuous effort on the part of petitioner to eke out a basis for the application of the doctrine laid down by *Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188* to this case is futile. Petitioner persists in misconstruing the decision of the Supreme Court of Lou-

(1) Civil Code Art. 2315 of Louisiana reads: "Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; ***".

isiana in *Booth v. Columbia Casualty Co., 227 La. 932, 80 So. 2d 869*, as establishing a rule of law, binding in all respects under any and all circumstances and sets of facts. As pointed out by the Court of Appeals in this case, all the Supreme Court of Louisiana did in that case was find the facts in *that* case, which, of course, can have no effect on the trier of facts as to the facts he may find in a subsequent case between different parties and involving different circumstances. As aptly said by the Court of Appeals, the decision of an appellate court of Louisiana involving one state of facts does not convert a fact determination in a particular case into a rule of decision binding the triers of facts in subsequent cases to decide them in the same way.

If this Courts sits to review the facts in every damage suit where plaintiff fails to prevail there would be no end to the demands upon the time and patience of this Court. This Court has consistently held that it will not grant a writ of certiorari to review evidence or the inferences to be drawn therefrom, or discuss specific facts.

> *Chicago Junction Railway Co. v. King*, 222 U.S. 222, 56 L. Ed. 173;
>
> *Boehmer v. Pennsylvania Railroad Co.*, 252 U.S. 496, 64 L. Ed. 680;
>
> *United States v. Johnston*, 268 U.S. 220, 69 L. Ed. 925;
>
> *General Talking Picture Corp. v. Western Electric Co.*, 304 U.S. 173, 82 L. Ed. 1273.

Merely a question of fact being involved in this cause, it is respectfully submitted that the petition for writs of certiorari should be denied.

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